Supreme Court, U.S.
FILED
07-139 AUG 1 - 2007
OFFICE OF THE CLERK

Docket No. _____

SUPREME COURT OF THE UNITED STATES

WALLACE
v.
FEDERATED DEPARTMENT STORES, INC.,
et al.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

MARGARET WALLACE, Pro Se Petitioner
P.O. Box 8732, Allentown, PA 18105-8732
Phone: 610-351-8293

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19103-7501

(Related to EDPA Civil No. 05-04204
Third Circuit No. 06-3286
Employment Discrimination under 42 U.S.C. §§
1983, 1985, 1986 - Does not fall under Title VII of
the Civil Rights Act)

QUESTIONS PRESENTED FOR REVIEW

1. Are the security staff of Macy's state actors when the ten inextricably entwined factors in the case are considered together. (These ten factors are itemized in the case, being too lengthy to include in the question.)

2. Was the Plaintiff a victim of prevailing company (Federated Department Stores/ Macy's East) policy of (racial) profiling by store security personnel that the companies were trying to eliminate by re-educating their security staffs?

3. Can it be fairly said that (racial) profiling by company (Federated Department Stores/ Macy's East) security staffs had its origins in State action (as evidenced by numerous prior

cases against Federal/State law enforcement personnel), and carried over into Federated Department Stores/Macy's East?

4. Since the Reasonable Person could plainly see the computer/clerical error used against the Plaintiff was not attributable to her in any way, hence lack of "probable cause" for the seizure and detention, did Federated Department Stores/Macy's East security staff, acting with others subsequently, violate her Rights through use of (racial) profiling based on a "non-issue"?

5. Were Macy's security staff "state actors"? (It could not be determined whether they were employed by Macy's or contracted from a detective agency, but in either case they were

licensed under State law to detain for probable cause, etc., and no probable cause of any type existed since the few Dollars at issue never left Macy's accounts as security knew.)

6. Does a 42 U.S.C. § 1981 claim give rise to a 42 U.S.C. § 1985 claim in the present case? (See District Court notes 6-7 in Appendix, pp. 39-40 for this unresolved issue.)

7. Is the attorney fraud of Attorney Robert Joy and his colleague from Morgan, Brown & Joy LLP (representing Federated) on the Third Circuit Court, seeking to mislead that Court in the appeal, to be addressed by the Third Circuit Court per Chambers v. Nasco and other decisions by this Court, or addressed by the District Court per FRCP Rule 60(b)(3)?

LIST OF PARTIES

Petitioner:
Margaret Wallace

Respondents:
Federated Department Stores, Inc.
Terry J. Lundgren, Chairman, President and CEO
Corporate Security Director
Others Who Make and Set Security Policy
Corporate Compliance Officer
Others Who Set Company Policy
Corporate Loss Prevention Officer
Others Who Set Policy Regarding Loss

Macy's East, Inc.
Ronald Klein, Chairman and CEO
James E. Gray, President
William M. Bragg, Director, Security Training and Communications
Others Who Make and Set Security Policy

Macy's Lehigh Valley, Inc.
Robin Grimm, Store Manager
Keith Daugherty, Security Director, or Other Person in this position
Lynne Daniels, Manager
Male Security Person
Female Security Person
Pat, Clerk
Tara Ott, Employee Relations and Administration
Other Parties Unknown

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TABLE OF AUTHORITIES

To the best of Petitioner's knowledge, the total issues have never been decided, and there is a lack of case law regarding them in totality.

5 United States Comm'n on Civil Rights, Racial and Ethnic Tensions in American Communities: Poverty, Inequality and Discrimination, The Los Angeles Report 26 (June 1999) 21

Arizona v. Fulminante, 499 U.S. 279, 310 (1991) .26

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Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985) 18

P. Verniero, Attorney General of New Jersey, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 46 (Apr. 20, 1999) 20

Report of the Independent Comm'n on the Los Angeles Police Department 69 (1991) 20

Rodrigues (Orozco), 293 F.3d at 1202-1203 ...11, 15

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West v. Atkins, 487 U.S. 42, 49 (1988) 16

BASIS FOR JURISDICTION

Denial of Rehearing en banc in 06-3286 by the Third Circuit Court was entered on 7 May 2007.

Judgment by the Third Circuit Court in 06-3286 was entered 16 January 2007.

The statutory provision conferring jurisdiction to review the judgment in question on this Court on a writ of certiorari is 28 U.S.C. § 2101(e).

CONSTITUTIONAL PROVISIONS/STATUTES

42 U.S.C. §§ 1981, 1983, 1985, 1986

STATEMENT OF CASE

This petition seeks review of a decision of the United States Court of Appeals for the Third Circuit which exercised jurisdiction to review under 28 U.S.C. § 1291, holding the appeal was from the final order of a District Court and was an appeal as of Right under Rule 3 of the FRAP.

The District Court had jurisdiction pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, Federal Question Jurisdiction, and the Fourteenth and other Amendments of the United States Constitution, specifically Due Process of Law and Equal Protection.

The District Court case 2005 CV-4204 was entered 8 August 2005.

This case arose from Petitioner's unlawful termination of employment at Macy's due to an error by a clerk and/or the Macy's computer. Petioner was employed initially as a clerk at Macy's on a seasonal basis. During that time she purchased a sweater using the Macy's 20% employees' discount card. Her Daughter also purchased a Macy's $50. gift card for her. Petitioner returned the sweater and 20% of the return was credited to her gift card, not her employee discount card, but she was unaware of this. The error was due either to the clerk accepting the return, the Macy's computer system, or a combination of both. Seasonal employment ended.

Petitioner applied for and was hired at the same Macy's store as a permanent clerk. Shortly after permanent employment commenced, Petitioner

was summoned to the in-store security office and interrogated, being forced to sign unknown papers which probably admitted some type retail theft. Male and female security staff admitted the in-store security director had authorized this interrogation and its details. Petitioner under duress signed the papers without knowing what they said. The incident occurred due to Petitioner's sweater incident when she was seasonally employed.

Petitioner's employment was terminated after the security incident, and (laughably) terminated a second time by Tara Ott in charge of regional staffing. The few Dollars in question never left Macy's account (employee discount and gift card), and was never out of their possession.

Petitioner's Husband promptly brought suit

against Macy's and the offensive personnel who had no probable cause to detain and subject Petitioner to a "Kangaroo Court" type proceeding (condemned by Justice Douglas).

It was immediately evident that Petitioner, who is "non-white", having grown up in Africa, was a target of racial profiling by Macy's (and their parent Federated) security staff. Security staff at the Macy's store is "white" and "Hispanic". The several others involved in terminating employment of Petitioner are all "white".

Review of the Macy's website disclosed that top Macy's professionals were trying to eliminate racial profiling by Macy's security (loss prevention) which must have been a serious problem due to the level at which it was being addressed.

This was copied from the Macy's website:

1. TRAINING TECHNIQUES AND POLICIES DESIGNED TO ELIMINATE RACIAL PROFILING BY STORE LOSS PREVENTION DETECTIVES
The objective of this session is to facilitate an internal training program to prevent racial profiling, improve customer service and avoid liability. Attendees will discuss a series of training concepts and policies that have been designed to raise awareness of the racial profiling issue and educate the store-line team to take race-neutral actions in their effort to reduce shortage. (Macy's East website) (Plaintiff's underlining)

2. ELECTRONIC CRIMES INVESTIGATIONS THE NEW LOSS PREVENTION FRONTIER
Traditionally, obtaining e-mail file folders, computer files, electronic data transfers, and information on data access of various company employees has been a very passive part of a good loss prevention investigation. Now it is essential that LP drive an active investigation process through all of the possible electronic footprints that may have been left behind by dishonest and ethically challenged employees and stakeholders. (Plaintiff's underlining)

Macy's security staff were told to:

> drive an active investigation process through all of the possible electronic footprints that may have been left behind by dishonest and ethically challenged employees and stakeholders

for which they would receive a reward (money and promotion). At a future time they were also to be "re-educated" to avoid racial profiling.

In menial minds collecting money and being promoted for "catching" fellow employees far outshadowed any thought of avoiding racial profiling. The Reasonable Person looking into the Petitioner's case would immediately see two things. The money she was alleged to have "shoplifted" never left Macy's accounts. She was racially profiled since no evidence existed to connect her with crediting the few Dollars to the wrong card.

It is worthy of note that District Court Judge Joyner was asked to recuse himself at the onset of the case. This is because he entered a fraudulent statement against Petitioner in an earlier case (2005 CV-2797, EDPA) for which suit was later brought against him (2006 CV-5670, EDPA) and which he and the US Attorneys tried to thwart).

The same Judge Joyner "sat on" the present case without action until the time to enter a Title VII action to supplement the case had passed. In his order he then states that the time for a Title VII action had passed.

The case did not fall primarily into a Title VII type action, and was brought under the present causes of action.

ARGUMENT

This case brings together the following elements inextricably entwined: (1) (racial) profiling by law enforcement, (2) detention and probable cause by law enforcement, (3) whether it can be fairly said some of the Defendants were "state actors", (4) signing a "confession" under duress by law enforcement, (5) prevailing company security policy based on (racial) profiling, (6) "deliberate indifference", (7) store computer/clerk error fraudulently blamed on the Plaintiff, (8) money that never left the store account, (9) termination of employment based on the foregoing, and (10) violation of Constitutional Rights based on all of these. These issues have never been decided in context by any Court (as far as Petitioner can tell).

Petitioner contends that these ten issues inextricably entwined in her case make Macy's security staff "state actors". This is coupled with the two courses of action at Macy's corporate, to "catch" dishonest employees who use computer schemes, and to prevent racial profiling, both directed at Macy's security people (whether employed directly or hired from a security contractor).

This Court progressively developed four tests for courts to use to determine what gives rise to state action by an otherwise private party, (1) the public function test, (2) the nexus test, (3) the joint action test, and (4) the symbiotic relationship test. Ref. Rodrigues (Orozco), 293 F.3d at 1202-1203 (reviewing comprehensively the Court's longstanding tests for state action as impacted by Brentwood),

Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995) (offering an exhaustive discussion of the classic tests for state action).

(1) Under the public function test, a court determines whether a private entity has exercised "powers traditionally exclusively reserved to the State." Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974).

Law enforcement is "[a] power[] traditionally exclusively reserved to the State."

> **police power**
> 1. The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice. It is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from government.
> *Black's Law Dictionary*, West Group (8th ed. 2004), p. 1196.

In store security is duly licensed under law by the State as an extension or "arm" of "police power". The fundamental power of Government underlying the licensing under law of in store security personnel can never be "irrevocably transferred away from government", and in store security is inextricable linked to Government.

Under the public function test in store security of the private entity Federated- Macy's wield "powers traditionally exclusively reserved to the State." They thus qualify as "state actors".

(2) Under the nexus test a court considers whether "'there is a sufficiently close nexus' between the government and the challenged conduct such that theconduct 'may be fairly treated as that of the State itself.'" Gallagher, 49 F.3d 1442, 1448 (10th Cir.

1995) (quoting Jackson, 419 U.S. at 351).

The challenged conduct is (racial) profiling resulting in unlawful detention with absolutely no probable cause that could be conceived by the Reasonable Person (store computer error or clerk's error) resulting in unlawful termination of employment twice and subsequent deprivation of Substantive and Procedural Due Process and Equal Protection Rights under the Fourteenth Amendment and "other Rights" which include Fourth Amendment Rights to be free from the patently false detention for "loss" of a few Dollars that any normal person would see could never be attributable to her, and which never left Macy's account.

Hundreds of Supreme Court and Circuit Court cases show that the misguided policy of (racial)

profiling originated with State (and Federal) law enforcement "such that the conduct 'may be fairly treated as that of the State itself.'"

> While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a 1983 action, if the second element of the state-action requirement is met as well. Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982)

Under the nexus test

> [A] state normally can be held responsible for a private decision 'only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.' Rodrigues (Orozco), 293 F.3d at 1203 (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

The Third Circuit has held:

> [O]ur cases disclose certain principles of general application. Our precedents establish

> that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority. Groman v. Twp. of Manalapan, 94-5200.

For purposes of the nexus test Macy's security staff "actor[s] [were] performing a traditional governmental function" prevention/investigation of theft.

> But any approach a court uses must remain focused on the heart of the state action inquiry, which, as we noted above, is to discern if the defendant "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). Edmonson emphasized the importance of this inquiry. 500 U.S. at 620 . Third Circuit, Groman v. Twp. of Manalapan, 94-5200.

Another way to say this is:

> [W]hether "the private entity has exercised powers that are traditionally the exclusive prerogative of the state." Blum v. Yaretsky, 457 U.S. at 1004 -05, 102 S.Ct. at 2786 (emphasis added) (internal citation omitted). Third Circuit, Mark v. Enterprise Fire Co., 94-1722.

Until the seminars advertised Federated-Macy's exhibited "deliberate indifference" (Supreme Court definition) to the issue of (racial) profiling by security staff in their stores. This is "tantamount to intent" and liability under § 1983 can be inferred:

> Where, in the most obvious example, the policymaker sits on his hands after repeated, unlawful acts of subordinate officers and that failure "evidences a 'deliberate indifference' to the rights of [the municipality's] inhabitants," Id., at 389, the policymaker's toleration of the subordinates' behavior establishes a policy in practice just as readily attributable to the municipality as the one act policy in practice described above. Such a policy choice may be inferred even without a

pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference. Id., at 390, n. 10.

Deliberate indifference is thus treated, as it is elsewhere in the law, as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes. Compare Pembaur, supra, at 483 (plurality opinion of Brennan, J.) ("deliberate choice" by policymaker) and Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985) (plurality opinion of Rehnquist, J.) (" 'policy' generally implies a course of action consciously chosen") with Canton, supra, at 389 ("Only where a municipality's failure to train its employees . . . evidences a 'deliberate indifference' to the rights of its inhabitants can . . . a shortcoming be . . . city 'policy or custom' . . . actionable under §1983").

The Court goes a step further, however, in requiring that the "particular" harmful consequence be "plainly obvious" to the policymaker, ante, at 13, a characterization of deliberate indifference adapted from dicta set forth in a footnote in Canton, see 489 U.S., at 390, n. 10. Canton, as mentioned above, held that a municipal policy giving rise to liability

under §1983 may be inferred even when the policymaker has failed to act affirmatively at all, so long as a need to control the agents of the Government "is so obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymake[r] . . . can reasonably be said to have been deliberately indifferent to the need." Id., at 390. Board of the County Commissioners of Bryan County, Oklahoma v. Brown, 95-1100 (1997) (Petitioner's underlining)

The Third CircuitCourt has held:

[A] municipal entity may be liable when its policymakers made a deliberate choice from among various alternatives to follow a particular course of action, where the policy reflected deliberate indifference to the constitutional rights of the municipality's inhabitants, and where the policy was the moving force behind a constitutional violation.

In Monell , the Supreme Court held that "when execution of a government's policy or custom, whether by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury then the government as an entity is responsible under § 1983." 436 U.S. at 694 , 98 S.Ct. at 2037-38.

Third Circuit, Mark v. Enterprise Fire Co., 94-1722.

This Court held that racial profiling was a "policy" in certain states, and it would be difficult to disprove it existed also in Pennsylvania:

> Footnote 9
> The Chief of the Washington, D. C., Metropolitan Police Department, for example, confirmed that "sizeable percentages of Americans today--especially Americans of color--still view policing in the United States to be discriminatory, if not by policy and definition, certainly in its day-to-day application." P. Verniero, Attorney General of New Jersey, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 46 (Apr. 20, 1999) (hereinafter Interim Report). And a recent survey of 650 Los Angeles Police Department officers found that 25% felt that "`racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.'" Report of the Independent Comm'n on the Los Angeles Police Department 69 (1991); see also 5 United States Comm'n on Civil Rights, Racial and

Ethnic Tensions in American Communities: Poverty, Inequality and Discrimination, The Los Angeles Report 26 (June 1999).

Footnote 10
New Jersey's Attorney General, in a recent investigation into allegations of racial profiling on the New Jersey Turnpike, concluded that "minority motorists have been treated differently [by New Jersey State Troopers] than non-minority motorists during the course of traffic stops on the New Jersey Turnpike." "[T]he problem of disparate treatment is real -- not imagined," declared the Attorney General. Not surprisingly, the report concluded that this disparate treatment "engender[s] feelings of fear, resentment, hostility, and mistrust by minority citizens." See Interim Report 4, 7. Recently, the United States Department of Justice, citing this very evidence, announced that it would appoint an outside monitor to oversee the actions of the New Jersey State Police and ensure that it enacts policy changes advocated by the Interim Report, and keeps records on racial statistics and traffic stops. See Kocieniewski, U. S. Will Monitor New Jersey Police on Race Profiling, N. Y. Times, Dec. 23, 1999, p. A1, col. 6.

Likewise, the Massachusetts Attorney General investigated similar allegations of egregious

police conduct toward minorities. The report stated:

> "We conclude that Boston police officers engaged in improper, and unconstitutional, conduct in the 1989-90 period with respect to stops and searches of minority individuals ... . Although we cannot say with precision how widespread this illegal conduct was, we believe that it was sufficiently common to justify changes in certain Department practices. Illinois v. Wardlow, 98-1036 (2000)

(3) Under the joint action test, state action exists if a private party is a "willful participant in joint action with the State or its agents." Dennis v. Sparks, 449 U.S. 24, 27 (1980). Courts have typically looked to "whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." Gallagher, 49 F.3d at 1453. If state and private officials have engaged in a substantial degree of cooperative action, or if state participation is "overt and significant" in facilitating

the deprivation of constitutional rights, a court will find state action. Id. at 1454 (citation omitted).

(4) Under the symbiotic relationship test, state action will be present if the state "has so far insinuated itself into a position of interdependence" with a private party that "it must be recognized as a joint participant in the challenged activity." Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). By way of elucidation, "extensive state regulation, the receipt of substantial state funds, and the performance of important public functions do not necessarily establish the kind of symbiotic relationship between the government and a private entity that is required for state action." Gallagher, 49 F.3d at 1451; see also Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) (originating the language

of "symbiotic relationship").

Little argument is needed to demonstrate the symbiotic relationship test. Macy's security would not exist, except by "symbiosis" under State licensing under law. Likewise, the State receives licensing fees from Macy's (or the source of the security people). Symbiosis is defined as "a cooperative relationship (as between two persons or groups", Webster's Ninth New Collegiate Dictionary, 1990, p. 1195. The relationship between the State licensing authorities and Macy's security is a symbiotic "business" relationship, the exchange of money for use of some measure of the State's police power (previously defined) which it cannot transfer away, but licenses under law.

REASONS FOR ISSUANCE OF THE WRIT

1. Pursuant to Rule 10(a) the Third Circuit Court "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power". The ten inextricably entwined factors in this case have never been decided by any Court. Correct proceedure would have been for the Third Circuit to submit a certified question to this Court for proper disposition. The Third Circuit avoided the complex inextricable intertwining, and this deprives the Petitioner of Rights.

2. Pursuant to Rule 10(c) the Third Circuit Court "has decided an important federal question in a

way that conflicts with relevant decisions of this Court". They have nowhere addressed the four tests and other rulings of this Court.

3. Racial profiling, an illegitimate consequence of state action, must be removed from all parts of society, including Macy's.

4. Those of a different color should not be made victims of "law enforcement" (Terry stops)

5. The decision of the Third Circuit contains "structural error":

> The Supreme Court has distinguished two kinds of constitutional error at trial: structural error and trial error. A structural error compromises the entire trial; it requires reversal because it involves a deprivation of a constitutional protection so basic that in its absence, "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" Arizona v. Fulminante , 499 U.S. 279, 310 (1991) (citation omitted).

Examples of structural error are a biased judge, Tumey v. Ohio , 273 U.S. 510 (1927), ... Structural error cannot be harmless; Robinson v. Del Tufo, Attorney General of NJ, 92-5667 (Third Circuit)

The Third Circuit did not consider the issues, but simply affirmed the District Court order regarding §§ 1983, 1985, 1986.

6. Public confidence in the Justice System will be restored if this Court deals with racial profiling in this context. (Citations above show that "non-white" people have little respect for law enforcement.)

7. This Court should set the example for all Courts in the world by dealing with victimization of minority groups.

8. Public policy by corporations must be brought into limits of the law regarding racial profiling.

9. Macy's security staff is shown to be "state actors" in the context of § 1983 under all four tests defined by this Court, (1) the public function test, (2) the nexus test, (3) the joint action test, and (4) the symbiotic relationship test, where a showing under only one test would qualify them as "state actors".

10. Macy's security staff operated under a prevailing policy of (racial) profiling that was in effect at the time of the Petitioner's incident at Macy's, and this is unconstitutional.

Integrity demands issuance of this Writ. The Petitioner has demonstrated beyond doubt that the Writ of Certiorari should issue to uphold law. Clerk/ computer error without probable cause is not a basis for victimization based on racial profiling.

This Court must consider the content of the two Macy's seminars, and what was actually occurring in the Macy's stores. What impact would the seminars have in the mind of typical security staff? How would they balance the "reward" for "catching" a fellow employee with racial profiling that was already rampant in the stores among security staff?

The Petitioner thanks the Court for Justice. Justice is the Guardian of Liberty (for those of any color).

Respectfully submitted,

Margaret Wallace

Margaret Wallace,
Pro Se Petitioner

Date: 1 August 2007

APPENDIX

Petition for Rehearing, Third Circuit Court,
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3286

MARGARET WALLACE, Appellant

v.

FEDERATED DEPARTMENT STORES, INC.; TERRY J. LUNDGREN, Chairman, President and CEO; CORPORATE SECURITY DIRECTOR, AND OTHERS WHO MAKE AND SET SECURITY POLICY; CORPORATE COMPLIANCE OFFICER, AND OTHERS WHO SET COMPANY POLICY; CORPORATE LOSS PREVENTION OFFICER, AND OTHERS WHO SET POLICY REGARDING LOSS; MACY'S EAST, INC.; RONALD KLEIN, Chairman and CEO; JAMES E. GRAY, President; WILLIAM M. BRAGG,Director, Security Training and Communications, and OTHERS WHO MAKE AND SET SECURITY POLICY; MACY'S LEHIGH VALLEY; ROBIN GRIMM, Store Manager; KEITH DAUGHERTY, Security Director, or OTHER PERSON IN THIS POSITION; LYNNE DANIELS, Manager; MALE AND FEMALE SECURITY PERSONS; PAT, Clerk; TARA OTT, Employee Relations and Administration; OTHER PARTIES UNKNOWN

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 05-CV-04204)
District Judge: Honorable J. Curtis Joyner

Present: SCIRICA, *Chief Judge*,
SLOVITER, McKEE, BARRY, AMBRO,
FUENTES, SMITH, FISHER, CHAGARES,
JORDAN, HARDIMAN, ALDISERT* and WEIS*
Circuit Judges

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN
BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

not having voted for rehearing by the court en banc,

the petition for rehearing is DENIED.

BY THE COURT,

/s/ D.Michael Fisher
Circuit Judge

Dated: May 7, 2007
CLW/cc: Ms. Margaret Wallace
Robert P. Joy, Esq.
Joann M. Lytle, Esq.
Lisa Salazar, Esq.

* The votes of Judge Aldisert and Judge Weis are limited to panel rehearing only.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3286

MARGARET WALLACE, Appellant

v.

FEDERATED DEPARTMENT STORES, INC.; TERRY J. LUNDGREN, Chairman, President and CEO; CORPORATE SECURITY DIRECTOR, AND OTHERS WHO MAKE AND SET SECURITY POLICY; CORPORATE COMPLIANCE OFFICER, AND OTHERS WHO SET COMPANY POLICY; CORPORATE LOSS PREVENTION OFFICER, AND OTHERS WHO SET POLICY REGARDING LOSS; MACY'S EAST, INC.; RONALD KLEIN, Chairman and CEO; JAMES E. GRAY, President; WILLIAM M. BRAGG,Director, Security Training and Communications, and OTHERS WHO MAKE AND SET SECURITY POLICY; MACY'S LEHIGH VALLEY; ROBIN GRIMM, Store Manager; KEITH DAUGHERTY, Security Director, or OTHER PERSON IN THIS POSITION; LYNNE DANIELS, Manager; MALE AND FEMALE SECURITY PERSONS; PAT, Clerk; TARA OTT, Employee Relations and Administration; OTHER PARTIES UNKNOWN

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 05-CV-04204)
District Judge: Honorable J. Curtis Joyner

Submitted under Third Circuit LAR 34.1(a)
January 11, 2007

Before: FISHER, ALDIESERT and WEIS,
Circuit Judges

OPINION

PER CURIAM

Margaret Wallace appeals the order of the United States District Court for the Eastern District of Pennsylvania granting the defendants' motion to dismiss her complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). This Court has jurisdiction under 28 U.S.C. § 1291, and we exercise plenary review over the decision to grant the motion to

dismiss. See Weston v. Pennsylvania, 251 F.3d 420, 425 (3rd Cir. 2001). We accept all factual allegations in the complaint as true, and draw all rwasonable inferences in favor of the non-moving party. See id.

I.

Walace filed a complaint against numerous defendants, including Federated Department Stores, Inc., several individual Macy's stores and the individuals who manage and own them, and various other employees of the named Macy's stores. Wallace alleges that she was unlawfully terminated from her employment at the Macy's store at Lehigh Valley Mall in Allentown, Pennsylvania. Wallace began her temporary, seasonal employment at Lehigh Valley in January 2005. As an employee, she was issued a discount card good for a twenty percent

discount on Macy's purchases.

In January 2005, Wallace purchased a sweater at Macy's, using her discount card to get the twenty percent discount. After realizing that she could not wear the sweater, Wallace returned it that same month. According to Wallace, when she returned the sweater, either the clerk or the computer system mistakenly applied a $1.70 credit to a Macy's *gift* card that her daughter had given her. Wallace maintains that the $1.70 represents the twenty percent of the sweater's price that was deducted from her original purchase due to her use of her employee discount card. Wallace alleges that the credit should have been made to her Macy's discount card, rather than her gift card, and that she was unaware of any error at the time. Wallace's temporary employment

ended.[1]

In March 2005, Wallace was hired as a non-seasonal sales associate at Macy's Lehigh Valley. According to Wallace, on March 32, 2005, Macy's Lehigh Valley employees confronted her regarding the $1.70 credit. Wallace alleges that Macy's management and security staff accused her of retail theft based on the credit. She contends she was interrogated by security staff without representation, forced to sign papers under duress, subjected to false charges, and unlawfully terminated. Wallace also contends her rights were violated when the defendants refused to provide information and copies of documents related to her termination. The complaint seeks relief under 42 U.S.C. §§ 1983, 1985, and 1986. In the complaint, Wallace also asks

to reserve the right to bring claims pursuant to 42 U.S.C. § 1981 and/or Title VII. The defendants filed a motion to dismiss for failure to state a claim.

The District Court granted the motion, concluding that (1) Wallace could not state a viable § 1983 claim because she could not show state action, (2) Wallace could not state a § 1985 claim because (a) a Title VII claim cannot form the basis for a cause of action under § 1985, and (b) Wallace's remaining allegations, which - broadly construed - raise Fourth and Fourteenth Amendment claims, fail for a lack of state action; and (3) Wallace could not state a § 1986 claim because a § 1985 violation is prerequisite. Wallace appealed. Wallace has also filed a "Petition for Relief from Fraud" in this Court.

[1] After examining the receipts submitted with the complaint, the District Court concluded that the

futile for the District Court to allow Wallace to amend her complaint.

We agree with the District Court's conclusions concerning Wallace's § 1983, § 1985, and § 1986 claims. Because Wallace could not present additional information that would transform her allegations into viable claims, we conclude with regard to these claims that amendment would be futile and thus will affirm the District Court's judgment as to these claims.

However, we cannot conclude that any amendment that Wallace might make would be futile. Section 1981 prohibits racial discrimination in the making and enforcement of contracts and property transactions. A plaintiff need not allege state action on the part of the defendant in order to pursue § 1981

relief. See Brown v. Philip Morris, Inc., 250 F.3d 789, 797 (3d Cir. 2001). In the employment context, § 1981 claims are analyzed under the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), for analyzing Title VII discrimination cases. See Pamintuan v. Nanticoke Mamorial Hospital, 192 F.3d 378, 385 (3d Cir. 1999). In order to establish a *prima facie* case, Wallace must show that (1) she is a member of a protected class, (2) she satisfactorily performed the duties required by the position, (3) she suffered an adverse employment action, and (4) either similarly-situated non-members of the protected class were treated more favorably or the adverse job action occurred under circumstances that give rise to an inference of discrimination. See Sarullo v. United

States Postal Service, 352 F.3d 789, 797 (3d Cir. 2003). The burden then shifts to the defendants to articulate a legitimate, non-discriminatory reason for the challenged action. *Id.* While there is currently very little information in the complaint to support a *prima facie* case of discrimination pursuant to § 1981, Wallace does cite a Macy's training session on "eliminating racial profiling by store loss prevention detectives", and indicates her suspicions that she may have been "racially profiled". We have often noted that the bar for establishing a *prima facie* case of employment discrimination is low. See, e.g., Ezold v. Wolf, 983 F2d. 509, 523 (3d Cir. 1993). Under these circumstances, we cannot conclude that Wallace will be unable to state a claim with respect to 42 U.S.C. § 1981.

In its opinion, the District Court twice notes that Wallace "has not actually asserted a § 1981 claim" and has instead suggested that she may raise it at some later time. We review *pro se* complaints liberally. See Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003). After evaluating in context the numerous times Wallace mentions § 1981 in her complaint, we have determined that Wallace intends to reaise the § 1981 claim in this case, rather than in some future action. It is apparent from reading the complaint that Wallace was awaiting definitive information from the discovery process in this matter before articulating a § 1981 violation. This level of caution with regard to the claim reflects Wallace's unfamiliarity with notice pleading rather than an intent to bring a § 1981 claim in another action.

Accordingly, we will vacate the judgment of the District Court to the extent it grants the motion to dismiss with regard to claims other than those raised pursuant to § 1983, § 1985, and § 1986, and remand the matter for proceedigs consistent with this opinion. The judgment is otherwise affirmed. Wallace's submission in this Court alleging fraud by counsel for the defense invokes Federal Rule of Civil Procedure 60(b), which only applies to proceedings in District Court. Accordingly, Wallace's "Petition for Relief" is denied.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3286

MARGARET WALLACE, Appellant

v.

FEDERATED DEPARTMENT STORES, INC.; TERRY J. LUNDGREN, Chairman, President and CEO; CORPORATE SECURITY DIRECTOR, AND OTHERS WHO MAKE AND SET SECURITY POLICY; CORPORATE COMPLIANCE OFFICER, AND OTHERS WHO SET COMPANY POLICY; CORPORATE LOSS PREVENTION OFFICER, AND OTHERS WHO SET POLICY REGARDING LOSS; MACY'S EAST, INC.; RONALD KLEIN, Chairman and CEO; JAMES E. GRAY, President; WILLIAM M. BRAGG,Director, Security Training and Communications, and OTHERS WHO MAKE AND SET SECURITY POLICY; MACY'S LEHIGH VALLEY; ROBIN GRIMM, Store Manager; KEITH DAUGHERTY, Security Director, or OTHER PERSON IN THIS POSITION; LYNNE DANIELS, Manager; MALE AND FEMALE SECURITY PERSONS; PAT, Clerk; TARA OTT, Employee Relations and Administration; OTHER PARTIES UNKNOWN

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 05-CV-04204)
District Judge: Honorable J. Curtis Joyner

Submitted under Third Circuit LAR 34.1(a)
January 11, 2007

Before: FISHER, ALDIESERT and WEIS,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on January 18, 2007. On consideration whereof, it is now herey

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered June 9, 2006, be, and the same is hereby affirmed in part

and vacated in part, and this matter is remanded to the District Court for further proceedings. All of the above in accordance with the opinion of this Court.

ATTEST

/s/ Marcia M. Waldron

Clerk

DATED: January 16, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET WALLACE

v.

FEDERATED DEPARTMENT STORES, INC. et al.

CIVIL ACTION 05-4204

MEMORANDUM AND ORDER

JOYNER, J. June 7, 2006

Via the motion now pending before this Court, Defendants, Federated Department Stores, Inc., and the individually named defendants ("Defendants"), move to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6).[1] For the reasons outlined below, the motion shall be granted.

Factual Background

Plaintiff Margaret Wallace brings suit pursuant to 42 U.S.C. §§ 1983, 1985, and 1986. Plaintiff alleges she was unlawfully terminated from her employment at the Macy's store at Lehigh Valley Mall in Sllentown, Pennsylvania (Macy's Lehigh Valley"). Plaintiff began her temporary, seasonal employment with Macy's Lehigh Valley in January 2005. Employees ate Macy's Lehigh Valley are issued a discount card that is good for a twenty percent discount on Macy's purchases. In addition to this discount card, Plaintiff was given a Macy's gift card by her daughter.

In January 2005, Plaintiff purchased a sweater at Macy's, using her discount card to get the twenty percent discount. Plaintiff later realized that the

sweater contained wool. Because Plaintiff cannot wear wool, she returned the sweater to Macy's some time before the end of January 2005. Plaintiff alleges that when she returned the sweater, the clerk (or the computer) processing the return mistakenly applied a $1.70 credit to Plaintiff's Macy's gift card. According to Plaintiff, the $1.70 represents the twenty percent of the sweater's price that was deducted from Plaintiff's original purchase because of her employee discount card. Plaintiff alleges that the credit should have been made to her Macy's discount card, and that she was unaware of any error because her role was merely that of a customer.

Plaintiff's temporary employment ended some time before the end of January 2005. In March 2005, Plaintiff applied for and was awarded a non-seasonal

sales associate position at Macy's Lehigh Valley. On March 31, 2005, Plaintiff alleges that Macy's Lehigh Valley employees confronted her regarding the $1.70 credit. It is not entirely clear from the facts set forth in Plaintiff's Complaint what caused the credit to become an issue that time. Plaintiff alleges that Macy's Lehigh Valley management and security staff accused her of retail theft based on the fact that she had received a credit for the full price of the returned sweater, rather than the price minus the employee discount.[2]

Plaintiff alleges that she was interrogated by security staff without representation by counsel, forced to sigh papers "under duress", subjected to false charges, and unlawfully terminated. Plaintiff further asserts that he rights were violated when the

store manager, and subsequently the regional Director of Employee Relations and Administration, refused to provide information and copies of documents related to Plaintiff's termination. Plaintiff seeks to recover a total of three million dollars (approximately $150,000.00 from each defendant) for the alleged violations of her civil rights.

[1]Plaintiff argues that the motion to dismiss was not filed on behalf of all named defendants, and that a default judgment is therefore warranted. All of the named defendants are represented by the same counsel. The only 'defendants' not specifically identified in the motion were "Male and Female Security Persons, Presently Unidentified," "Pat, Clerk #236904 (from receipt)," and "Other Parties Unknown." No default judgment will be entered against parties that are not identified or are minimally identified, particularly where no motion for default has been filed pursuant to Federal Rule of Civil Procedure 55.

[2]Thisallegation as to the basis for the retail theft accusation is not supported by the copies receipts attached to the Complaint. The receipts indicate that Plaintiff purchased a sweater for $8.41

on January 1, 2005, and charged that purchase, along with another sweater, to her Macy's credit card. (Pl.'s Compl. Exs.) On January 4, 2005, a $55.00 gift card was purchased. (Id.) The return is marked on the credit card purchase receipt, but the only receipt attached showing a credit of $8.41 is a credit to the gift card purchased January 4. (Id.) That credit was applied, and $10.11 was charged for another sweater against the gift card, such that the actual amount subtracted from the gift card was only $1.70. (Id.) The gift card's balance at the conclusion of the January 8 transaction was $53.30. (Id.) This indicates that there was not a credit of $1.70, but rather this amount was paid from the gift card to cover the difference between the returned sweater and the purchased sweater. (Id.) Plaintiff then returned the $10.11 sweater, and that amount was credited back to the gift card, bringing the gift card balance to $63.41. (Id.) Thus, the amount at issue is actually $8.41 - the difference between the amount for which the card was purchased and the ending balance of the card on the last receipt included with the Complaint. The $1.70 was entirely unrelated to the employee discount, contrary to Plaintiff's apparent understanding of the facts.

Standards Governing Rule 12(b)(6) Motions to Dismiss

Generally speaking, in considering motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the

district courts must "accept as true the factual alloegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000) (internal quotations omitted). See also Ford v. Schering-Plough Corp., 145 F.3de 601, 604 (3d. Cir. 1998). A motion to dismiss may only be granted where the allegations faikl to state any claim upon which relief may be granted. See, Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). Where the plaintiff is a pro se litigant, the Court is obliged to construe the complaint liberally in the plaintiff's favor. See Haines v. Kerner, 404 U.S. 519, 520-521, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972).

The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether

they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc. 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warrented only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir.1999) (internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund

v. Washington, 368 F.3d 228, 236 (3rd Cir. 2004). In re Burlington Coat Factory Securities Litigation, 114 F.3rd 1410, 1426. See also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3rd Cir. 2004).

Discussion

Plaintiff initiated the instant suit to recover for alleged discriminatory treatment by her former employer and a number of individual employees. Plaintiff attempts to set forth claims for relief pursuant to 42 U.S.C. §§ 1983, 1985, and 1986. Plaintiff also suggests that she may, at some later time, seek relief under 42 U.S.C. § 1981.[3] Defendants seek dismissal on the basis that Plaintiff has failed to state any claim for which relief may be granted.

[3] Plaintiff acknowledges that she cannot pursue a Title VII claim because she did not exhaust the administrative remedies necessary for recovery under that statute. (Pl.'s Compl. at 1.) Plaintiff later suggests in her Complaint that some cause of action pursuant to Title VII might accrue. (Pl.'s Compl. At 4, 20.) Given that Plaintiff is no longer an employee of any of the Defendants, and that all deadlines for pursuing such a claim through the required administrative processes have admittedly lapsed, no claim based on the prior employment relationship can arise under Title VII.

§ 1983

To state a viable claim pursuant to § 1983, a plaintiff must show that a person (or persons) acting under color of state law deprived her of a right conferred by the Constitution or federal law. See 42 U.S.C. § 1983. Defendants argue that Plaintiff cannot state a claim for relief under § 1983 because none of those she alleges to have violated her rights were acting under color of state law.

In a case involving private parties, a plaintiff

may show the requisite state action by establishing that "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982). Determining whether actions are can fairly be attributed to the state requires consideration of two factors:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.
> Id.

Plaintiff argues that, by virtue of the state laws licensing private security officers, Macy's security personnel were acting under color of state law. (Pl.'s

Pet. in Opp. to Def.'s Mot. to Dismiss Compl. with Prejudice ("Pl.'s Resp.") at 10-13. The Commonwealth of Pennsylvania licenses private detectives pursuant to the Pennsylvania Private Detective Act of 1953, 22 Pa. Stat. Ann. § 11 et seq. The mere licensing of detectives or security officers is generally insufficient to place the actions of such individuals under the color of state law. See Gipson v. Supermarkets Gen'l Corp., 564 F. Supp. 50, 55 n.3 (D.N.J. 1983) (citations omitted). If that were the case, every attorney (not to mention every state-licensed driver, realtor, and funeral director), would be acting under color of state law every time he of she engaged in the licensed activity. Thus, courts have distinguished acting under state license from acting under state law. See id. (Interpreting Weyandt

v. Mason's Stores, Inc., 279 F. Supp. 283 287 n.3 (W.D. Pa. 1868)). In doing so, courts have treated private detective licensing laws differently than statutes that specifically confer the power to effect a legal arrest. See id. (Noting that the Weyandt court distinguished a detective licensed under Pennsylvania Private Detective Act of 1953 from one empowered by the Professional Thieves Act of 1939 to make an arrest). Thus, the store security staff - whether directly employed by Macy's or employed through a security contractor - are not state actors by virtue of their state licensing requirements.

Plaintiff does not directly present an argument for state action based on Macy's apparent invocation of the Pennsylvania Retail Theft Act, but such an argument would fail even if made. The Third Circuit

has determined that the conduct of a store and its employees cannot properly be attributed to the state unless the store has a pre-arranged with police under which the police will "arrest anyone identified as a shoplifter by the store without independently evaluating the presence of probable cause." Cruz v. Donnelly, 727 F.2d 79, 81 (3rd Cir. 1984). The 'shopkeeper's privilege'by allowing a merchant or his employee "who has probable cause to believe that retail theft has occurred" to detain the suspect "in a reasonable manner for a reasonable time" to determine whether such theft has occurred and, if it is so, to then inform a peace officer. 18 Pa. Cons. Stat. Ann. § 3929(d); see also Lynch v. Hunter, Civ. A. No. 00-1331, 2000 U.S. Dist. LEXIS 13248, * 22-23 (E.D. Pa. Sept. 1, 2000). Pennsylvania and federal

courts hold that store employees - including security officers - are not acting under color of state law by detaining a suspected shoplifter pursuant to the Pennsylvania Retail Theft Act. See id.; Vassallo v. Clover, Div. Of Strawbridge & Clothier, 767 F. Supp. 651, 652-53 (E.D. Pa. 1990). Thus, detention pursuant to the Pennsylvania Retail Theft Act is not considered either to be state action itself or to indicate a pre-arranged plan as required under Cruz. Lynch, 2000 U.S. Dist LEXIS at * 22-23.

Plaintiff cannot show that any of the defendants acted under color of state law or in concert with a state actor. Absent such a showing, Plaintiff cannot successfully state a claim for relief pursuant to § 1983.

§ 1985

Defendant argues that Plaintiff's § 1985 conspiracy claim must fail because § 1985 cannot provide a remedy for violations of Titls VII. Defendant suggests that, because Plaintiff's claim is essentially one of race-based employment discrimination, it is properly the subject of a Title VII suit and, therefore, cannot give rise to a § 1985 clsim.[4]

The Supreme Court has held that the "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)." Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 378 (1979) (superceded by statute on other grounds). Thus, to the extent that Plaintiff's § 1985 claim relies on a violation of Title VII, it cannot

survive.[5]

Plaintiff's Complaint, however, arguably suggests additional violations that might be the basis of a § 1985 claim.[6] We examine whether any of Plaintiff's allegations sufficiently state a violation of federal rights that can support such a claim.

Plaintiff alleges that she was subject to interrogation without being "appraised of her rights" or provided with counsel, and was forced to sigh papers "under duress." (Pl's Compl. At 14). This suggests that Plaintiff attempts to allege a violation of her Fourth Amendment rights. Violations of the Fourth Amendment protection against unreasonable search and seizure, as applied to the states via the Fourteenth Amendment, might be a basis for a § 1985 claim. Plaintiff, however, cannot properly plead

a search and seizure violation under the Fourth and Fourteenth Amendments protects against unreasonable searches and seizures only when conducted by the government or its agents. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 613 (1989). As established above in our disposition of Plaintiff's claim pursuant to § 1983, none of the Defendants acted under color of state law or as agents of the state in any fashion. See supra, p. 6-9.

Plaintiff's allegations with regard to the failure of Macy's personnel to forward "evidence" as requested are insufficient to support a § 1985 claim. This appears to be an attempt to make a claim for violation of due process.[7] The alleged actions simply are not violations of Plaintiff's due process rights. Violations of due process require action by the state,

or interference by a private party that prevents the state from adhering to the due process of law. See, e.g., Lugar, 457 U.S. at 937. As discussed above with regards to Plaintiff's § 1983 claims, there has been no state action here, nor any action in concert with the state. See supra, p. 6-9. The actions (or failures to act) alleged are, in essence, an allegation that Defendants refused to participate in discovery or fact-finding in the absence of a legal or administrative complaint. These actions of Plaintiff's private employer and its agents cannot be said to have interfered with the exercise of due process, because the notice pleading standard set forth by Federal Rule of Civil Procedure 8 does not require extensive investigation and exchange of information prior to the filing of a suit in federal court. See Fed. R. Civ. P. 8.

Plaintiff's right to conduct discovery pursuant to the Federal Rules of Civil Procedure did not accrue until after the filing of her suit and the completion of the prerequisites of Federal Rule of Civil Procedure 16. See Fed. R. Civ. P. 16(f).

Similarly, Plaintiff cannot rely on a due process violation in the termination of her employment to support her § 1985 claim. Plaintiff cannot make such a showing because constitutional protections for employment are generally limited to public employees, and Macy's is a private employer.[8] See generally Nicholas v. Pa State Univ., 227 F.3d 133 (3rd Cir. 2000).

To the extent that any of Plaintiff's allegations seek redress through § 1985 based on the Fourteenth Amendment's equal protection provisions, such

claims must also fail.

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[4] This is not to say that Plaintiff can state a valid claim for relief under Title VII. See supra n.3.

[5]Plaintiff does not specify which subsection of § 1985 is the basis of her claim, but quotes from both § 1985(2) and (3). These subsections, to the extent they address conspiracies to deprive have been found to require substantially similar elements. See, e.g., Brawer v. Horowitz, 535 F.2d 830, 840 (3rd Cir. 1976). Thus, we find no reason to treat these two sections differently for the purpose of determining whether claims under either may be premised on a Title VII violation.

[6]Plaintiff mentions the possibility of pursuing a § 1981 claim. The law is unsettled as to whether violations of § 1981 could properly give rise to a § 1985 claim. The Third Circuit has declined to address whether a § 1985 claim can properly rely on the alleged deprivation of rights guaranteed by § 1981. See Brown v. Philip Morris, Inc., 250 F.3d 789, 806 (3rd Cir. 2001) (noting that the question of whether alleged violation of § 1981can be the basis of a § 1985 claim need not be addressed because plaintiffs failed to articulate a 1981 claim). Interpretation of the dicta of Brown has varied among district courts And judges in the Third Circuit. Compare Gonzalez v. Comcast Corp., Civ. A. No. 03-445, 2004 U.S. Dist. LEXIS 14989, * 16 (D. Del July 30, 2004) (citing Dixon v. Boscov's, Inc., Civ.

A. No. 02-1222, 2002 U.S. Dist. LEXIS 13815, *2 (E.D. Pa. July 17, 2002) for proposition that the Third Circuit's decision in Brown compels the conclusion "that statutory rights pursuant to section 1981 cannot be the basis of a section 1985 remedy") with Abdulhay v. Bethlehem Med. Arts, L.P., Civ. A. No. 03-04247, 2004 U.S. Dist LEXIS 5494 (D. Pa. 2004) (determining that "the weight or persuasive authority from both the United States Supreme Court and the Third Circuit permits a Section 1981 or 1982 claim to be the basis for a Section 1985(3) claim"). We need not, however, resolve that question at this time, since Plaintiff has not actually asserted a § 1981 claim.

[7]Even if Plaintiff properly plead a due process violation, it is uncertain whether such a claim is sufficient to form the basis of a viable § 1985 claim. Compare Dunn v.New Jersey Transit Corp., 681 F. Supp. 246, 251 (D.N.J. 1987) (noting that § 1985(3) "does not provide a remedy for a conspiracy to deny the right of due process, as opposed to the right to equal protection under the law") with Fralin v. County of Bucks, 296 F. Supp. 2d 609, 614-15 (E.D. Pa. 2003) (silent as to whether due process violations give rise to a § 1985 claim, but dismissing on other grounds.

[8]Even if Plaintiff had a constitutionally protected interest in her employment, it is not clear that this would give rise to a cognizable § 1985 claim. See supra n.7.

§ 1986

Section is a derivative of § 1986 and, as such, a claim for relief under §1986 requires a violation of § 1985. Therefore, if the "claimant does not set forth a cause of action under the latter, its claim under the former necessarily must fail also." Rogin v. Bensalem Twp., 616 F. 2d 680, 696 (3rd Cir. 1980). Because Plaintiff failed to state any valid claims under § 1985, Plaintiff's § 1986 claim cannot survive.

Conclusion

For the reasons set forth above, Plaintiff has failed to state a claim for which relief can be granted, and amendment would be futile. Thus, Defendants' Motion to Dismiss is GRANTED and Plaintiff's Complaint is DISMISSED with prejudice.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET WALLACE

v.

FEDERATED DEPARTMENT STORES, INC. et al.

CIVIL ACTION 05-4204

ORDER

AND NOW, this 7th day of June, 2006, upon consideration of Defendant's Motion to Dismiss With Prejudice Plaintiff's Complaint, it is hereby

ORDERED that the motion is GRANTED and Plaintiff's Complaint is DISMISSED with prejudice for the reasons set forth in the preceding Memorandum Opinion.

BY THE COURT:

J. CURTIS JOYNER, J.